No. 74-884

In the Supreme Court of the United States

October Term, 1974

United States of America, Petitioner

v.

Josephine M. Powell

BRIEF IN REPLY TO THE UNITED STATES GOVERNMENT'S PETITION FOR A WRIT OF CERTIORARI

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v.

JOSEPHINE M. POWELL

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OPINION BELOW

The opinion of the court of appeals (App.A) is reported at 501 F.2d 1136.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), as the United States seeks review of the opinion of the United States Court of Appeals for the Ninth Circuit reversing respondent's conviction.

STATUTES

18 U.S.C. 1715 provides in part:

> Pistols, revolvers, and other firearms capable of being concealed on the person are

nonmailable and shall not be deposited in or carried by the mails or delivered by any officer or employee of the Postal Service. Such articles may be conveyed in the mails, under such regulations as the Postal Service shall prescribe . . .

QUESTIONS PRESENTED

1. Whether a statute prohibiting the mailing of "pistols, revolvers, and other firearms capable of being concealed on the person" is clear and definite enough to escape a challange that the statute is unconstitutionally vague as applied to short barreled shotguns with overall length of 22 inches.

2. Whether or not a statute which is unclear and indefinite on its face can become constitutionally definite by use of administrative regulations promulgated pursuant to said statute.

COUNTER-STATEMENT OF THE CASE

Respondent was charged with mailing an unmailable item in violation of 18 U.S.C. 1715, to-wit: a sawed-off shotgun of an overall length of 22 1/8 inches. Respondent was convicted after jury trial in United States District Court for the Eastern District of Washington.

Respondent appealed her conviction arguing that the statute was unconstitutionally vague when applied to short-barreled shotguns such as the one the Respondent was charged with mailing.

The Court of Appeals agreed with Respondent's vagueness challenge and reversed Respondent's conviction. The Court said in part:

> Although little question can be raised as to the concealability on the person of a pistol or revolver in common recognition of the normal limits of their size, the statutory prohibition as it might relate to sawed-off shotguns, is not so readily recognizable to persons of common experience and intelligence. (App. A, page 2a)

RESPONDENT'S ARGUMENT FOR DENYING PETITIONER'S WRIT OF CERTIORARI

Petitioner's argument in support of it's application for a writ seems to be twofold. First, Petitioner argues that the Court of Appeals could not, under Respondent's attack of vagueness, invalidate the statute (18 U.S.C. 1715) as that statute applies to short-barreled shotguns and similar shoulder guns, since, according to Petitioner, Respondent lacked standing to raise such an issue.

Secondly, Petitioner argues that any vagueness of 18 U.S.C. 1715 could be cured by bootstrapping the criminal statute with federal administrative regulations adopted by the Postal Service. Petitioner raises this second argument initially before this Court.

1. In a circuitous argument, Petitioner claims that since Respondent's conduct is properly subject to the terms of the statute, she may not then attack the statute's constitutionality. However, in order to make the argument Petitioner must assume as fact the very issue of Respondent's appeal. That is, whether or not the statute is in fact definite

enough to include in its proscription the conduct of the Respondent. The Court of Appeals ruled that the statute was not so definite. Except for Petitioner's bare assertion, Petitioner has made no showing to the contrary.

Respondent does not contend that the statute is unconstitutionally vague as it applies to pistols, revolvers and other firearms of the same general class as pistols and revolvers. The Court of Appeals impliedly upheld the definiteness of this statute when applied to pistols and revolvers. The Court's invalidation of the statute was directed towards short-barreled shotguns and other shoulder weapons such as is found in Respondent's case.

Respondent's challenge to the statute lies only with this larger and different class of weapons like sawed-off shotguns and short-barreled shotguns. Contrary to Petitioner's statement in it's Petition for Writ of Certiorari, the instant case is an appropriate case in which to consider "the statutes potential for uncertain application to larger weapons . . ." (Page 6, Petitioner's petition for Writ of Certiorari).

As Respondent argued before the trial Court and the Court of Appeals, a fair construction of the statute would have it apply only to pistols, revolvers, and other firearms of the handgun class. The statute's language makes nonmailable pistols, revolvers, and other firearms capable of concealment. Applying the principles of Esjudem Generis to the construction of this statute (18 U.S.C. 1715) specific language in the statute (pistols and revolvers) would restrict and define the more general language of the

statute (other concealable firearms). Therefore, the proper legal, as well as, common sense construction of the statute would be that concealable firearms in the class of pistols and revolvers would be nonmailable. Under such an interpretation the statute is not definite enough to give a person of ordinary intelligence fair notice that also included in this list of nonmailable weapons would be *shoulder guns* such as short-barreled shotguns. Indeed, such shoulder weapons are not normally considered concealable.

The use of the word *firearms*, in this statute, does not provide any additional support to Petitioner's argument that shoulder weapons such as short-barreled shotguns would be included in the prohibition of the statute. Firearms is a broad generic name for guns whether they be large or small. While the word helps define the statute as to the type of weapons that are nonmailable, (guns as opposed to knives, etc.) it does not add to the definition of the statute concerning the size of the firearm that is nonmailable. In fact, in Cokley v. People, 450 P.2d 1013 (Colo 1972) in a case strikingly similar to the one at bar, the Colorado Supreme Court held that sawed-off shotguns did not fall within the terms of "firearms as defined by law."

Firearms capable of being concealed does not normally bring to mind short-barreled shotguns. Short-barreled shotguns are not generally concealable. Indeed, the opinion of the Judges of the Court of Appeals was that such short-barreled shotguns are not generally considered concealable.

Petitioner's challenge to the ruling of the Court of Appeals does not seem to concern itself with the

issue of the vagueness of the statute as much as it does with Petitioner's belief that short-barreled shotguns should be nonmailable items. However, whether or not short-barreled shotguns should be nonmailable was not the issue before the Court of Appeals and it is not the issue before this Court. Petitioner argues that it was the intent of Congress that the mailing of such short-barreled weapons should be prohibited (a premise not necessarily found in the statute) and therefore, the statute should be interpreted to prohibit such conduct.

However, the issue before this Court is not the congressional intent of the statute, but whether or not the *language* of the statute is so clear and definite as to apprise the person of reasonable and ordinary intelligence that the statute prohibits the mailing of short-barreled shotguns. The Court of Appeals concluded that the language was not so definite and that if it was truly the intent of the legislature to proscribe such activity, then the statute could be drafted in language more definite so as to include short-barreled shotguns within it's prohibition.

Indeed, the Petitioner's argument could be raised in every case where there has been a successful challenge to the vagueness of a criminal statute. There is activity on the periphery of many statutes that may or may not have been intended by the legislature to be included in proscription of the statute. However, the test of the definiteness of a statute is not the intent of the legislation but the specificity of the language of the statute when ap-

plied to the activity meant to be proscribed. Also, this decision of whether or not a statute is constitutionally vague must be decided against the background that statutory interpretation requires criminal statutes to be strictly construed.

Petitioner has made no argument of statutory construction or definition of words involved in the statute which would give a more definite meaning to this statute than was concluded by the Court of Appeals. There is no reason then why this Court should review the opinion of the Court of Appeals. The Petitioner's application for a writ should be denied.

Secondly, the Petitioner argues that any indefiniteness in the statute has been cured by certain administrative regulations promulgated by the Postal Department and relating to this statute. Petitioner, in making this argument, must start with the premise that the statute is indefinite and vague as applied to short-barreled shotguns. The question then is if an indefinite criminal statute can be bootstrapped to a constitutionally definite status by the use of administrative regulations. Petitioner has cited no authority to support this argument.

Administrative regulations are not law. The purpose of administrative regulations is to create the *procedures* for carrying out the directives of the statute. It has never been the purpose of administrative rules and regulations to clarify or define portions of statutes that may otherwise be indefinite.

To permit administrative regulations to make otherwise constitutionally indefinite statutes con-

stitutionally certain would be to grant to administrative agencies the power to adopt, amend or repeal Federal statutes; a power that belongs exclusively with Congress and one that may not be delegated.

In the instant case the applicable administrative regulation states that all short-barreled shotguns of less than 26 inches shall be considered nonmailable. Petitioner then argues that irrespective of the statute's language, the administrative regulation makes it unlawful to mail a short-barreled shotgun of less than 26 inches. Following Petitioner's argument to its logical conclusion, if the Postal Service amended it's regulation to include 30 inch or 40 inch or 50 inch weapons, then these weapons would also fall under the statutes prohibition. Effectively, the administrative agency would have the power to alter or even emasculate a statute. Such is not the function of an administrative agency.

Petitioner's argument has even less force when one closely reviews the statute and regulations involved in this case. The only administrative authority granted to the Postal Service by 18 U.S.C. 1715 was the authority to adopt certain rules and regulations prescribing the manner in which nonmailable articles could be mailed by certain agencies such as the United States Army. The Postal Service was not authorized by the statute to determine what items would and what items would not be mailable but was only granted the rule making power to determine the *procedure* for mailing nonmailable items. The legislature did not intend to delegate and could not delegate to the Postal Service the

authority to define the crime charged in 18 U.S.C. 1715.

Finally, this issue, while novel in its approach, cannot be fairly considered by this Court. Petitioner's argument was not raised before the trial court or the Court of Appeals. Petitioner, however, argues that although the argument was not presented to the Court of Appeals, the Court of Appeals should take judicial notice of the regulation and hence judicial notice of Petitioner's argument. While the Court of Appeals may take judicial notice of the administrative regulation, (and indeed we must assume that the Court of Appeals was aware of the administrative regulations cited by the Petitioner) the Court of Appeals is not required, *sua sponte*, to raise Petitioner's argument. In fact, if we must presume anything, we must presume that the Court of Appeals raised Petitioner's argument on its own and after considering the same, ruled against such an argument. An argument of this magnitude being raised for the first time before this Court, should not be considered.

Therefore, Respondent respectively concludes that the Government's petition for Writ of Certiorari should be denied, and the mandate of the Court of Appeals for the Ninth Circuit should be carried out.

Respectively submitted.

JERRY J. MOBERG
Court Appointed
Counsel for Respondent

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-1252

United States of America, Plaintiff-Appellee

vs.

Josephine M. Powell, Defendant-Appellant

(August 7, 1974)

Appeal from the United States District Court for the Eastern District of Washington

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OPINION

Before: MERRILL and ELY, Circuit Judges, and REAL,* District Judge

PER CURIAM:

Appellant was convicted of a violation of 18 U.S.C. § 1715 for depositing in the United States mail a firearm capable of being concealed on the person, to wit: A sawed-off shotgun.

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*Honorable Manuel L. Real, United States District Judge, Central District of California, sitting by designation.

18 U.S.C. § 1715 provides in its pertinent part:

> "Pistols, revolvers, and other firearms capable of being concealed on the person are nonmailable . . . Whoever knowingly deposits for mailing or delivery or knowingly causes to be delivered by mail according to the direction thereon . . . any pistol, revolver, a firearm declared nonmailable by this section . . . shall be fined not more than $1000 or imprisoned not more than two years, or both."

Appellant attacks her conviction on the basis that 18 U.S.C. § 1715, insofar as it encompasses ". . . firearms (other than revolvers and pistols) capable of being concealed on the person," is unconstitutionally vague in violation of the Fifth Amendment due process. We agree.

Although little question can be raised as to the concealability on the person of a pistol or revolver in common recognition of the normal limits of their size, the statutory prohibition as it might relate to sawed-off shotguns is not so readily recognizable to persons of common experience and intelligence. Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939). The statute refers to "firearms capable of being concealed on the person . . ." Did Congress intend that this "person" be the person mailing the firearm, the person receiving the firearm, or, perhaps, an average person, male or female, wearing whatever garb might be reasonably appropriate, wherever the place and whatever the season? We believe that this question, of itself, demonstrates the impermissible vagueness of the statute and its inadequacy to define the intended offense with sufficient specificity.

To require Congress to delimit the seize of the firearms (other than pistols and revolvers) that it intends to declare unmailable is certainly to impose no insurmountable burden upon it; and its failure to do so is an infirmity in draftsmanship of constitutional proportions.1

Having decided the unconstitutional vagueness of this statute as it is applied to "other firearms," we need not reach the other assignments of error made by appellant.

The judgment is reversed.

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1 Innumerable State legislatures have met the challenge. *See, e.g.*, California Penal Code § 12001; Oregon Revised Statutes §166.210; Revised Code of Washington § 9.41.010.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-1252

DC C-9634

United States of America, Plaintiff-Appellee

vs.

Josephine M. Powell, Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Washington

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

A True Copy
Attest 1/10/75

EMIL E. MELFI, Jr., Clerk

by /s/ Ray Hewitt
RAY HEWITT, Senior Deputy

Filed and entered August 7, 1974